

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE,

Plaintiff,

v.

SSA TERMINALS LLC,

Defendant.

CASE NO. C11-1617-JCC

ORDER

This matter comes before the Court on Plaintiff's Motion to Compel Discovery, Award Attorneys' Fees and Continue the Case Schedule (Dkt. No. 46), Plaintiff's Motion for Leave to File Response or Strike (Dkt. No. 60), and Defendant's Motion for Protective Order re Financial Records (Dkt. No. 65). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART Plaintiff's motion (Dkt. No. 46), GRANTS Plaintiff's motion to strike (Dkt. No. 60), and DENIES Defendant's motion for protective order (Dkt. No. 65).

I. DISCUSSION

This is a suit brought under the Clean Water Act, although these motions concern only the parties' disputes about their discovery obligations. Parties may discover any non-privileged information that is relevant to its claims or the defenses of another party. Fed. R. Civ. P. 26(b)(1). "Relevant information for purposes of discovery is information reasonably calculated

1 to lead to the discovery of admissible evidence.” *Survivor Media, Inc. v. Survivor Productions*,
2 406 F.3d 625, 635 (9th Cir. 2005). The Court may grant a protective order for “good cause” to
3 protective a party from “annoyance, embarrassment, oppression, or undue burden or expense[.]”
4 Fed. R. Civ. P. 26(c). As this Court has already noted in this case, a party seeking a protective
5 order “bears the burden, for each particular document it seeks to protect, of showing that specific
6 prejudice or harm will result if no protective order is granted.” *Foltz v. State Farm Mut. Auto.*
7 *Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). If good cause is shown, the court may establish
8 the manner in which confidential commercial information may be revealed. Fed. R. Civ. P.
9 26(c)(1)(G).

10 Courts have broad discretion to control discovery. *See Avila v. Willits Envtl. Remediation*
11 *Trust*, 633 F.3d 828, 833 (9th Cir. 2011). At the same time, the Federal Rules strongly encourage
12 parties to resolve discovery disputes privately and discourage them from seeking needless court
13 intervention.

14 **A. Responsive Documents**

15 Some subset of the ESI that Plaintiff seeks consists of ESI from the Floyd Snider
16 Consulting firm. (Dkt. No. 55 ¶ 4.) Defendant represented in its response motion that
17 approximately 3,700 documents remained to be reviewed and that it would have completed
18 review on these documents “before this matter is decided.” (Dkt. No. 55 ¶ 13.) To the extent that
19 Defendant has not yet produced any non-privileged documents from the original set of 166,074
20 documents referred to (Dkt. No. 55 ¶ 13), Defendant is ORDERED to do so within 14 days.

21 **B. Additional ESI discovery**

22 Plaintiff also seeks to require Defendant to search for responsive documents in other
23 locations. (Dkt. No. 46 at 11.) Defendant argues both that the Joint Status Report should be
24 amended to address ESI issues, and that discovery has already imposed a disproportionate
25 burden. (Dkt. No. 51 at 10.) It appears that at least some of the extra effort about which
26 Defendant complains would have been resolved had it initially clarified the scope of the terms

1 (*see, e.g.*, Dkt. No. 55 ¶¶ 21, 30), and to that extent the burden on Defendant does not necessarily
2 reflect the appropriateness of further discovery. Even so, the Court agrees the proportionality of
3 the effort expended on ESI discovery to date may nonetheless be an issue. These are, however,
4 precisely the sorts of disputes that are meant to be avoided by the establishment of a plan
5 governing ESI production initially.

6 The Local Civil Rules require parties to adopt a plan governing any ESI production.
7 W.D. Wash. Local Civ. R. 26(1)(I)–(J), (2), (3). It appears that the parties discussed the need to
8 amend the Joint Status Report to address ESI issues but failed to do so. Plaintiff is correct that it
9 was allowed to bring this motion absent such an amendment. But Plaintiff has also represented
10 that it “does not object to formalizing a complete ESI agreement once the Court resolves the
11 outstanding ESI disputes.” (Dkt. No. 56 at 7 n.12.) The Court declines, however, to decide this
12 issue before the parties have even attempted to determine whether the district’s model ESI
13 agreement—or an agreement similar to that—might appropriately resolve the issues, including
14 by establishing the relevant sources for any discoverable material. In the absence of such a plan,
15 the Court DENIES the motion to compel in relevant part.

16 **C. Financial Records**

17 Also at issue are financial records from Defendant, which are the subject both of
18 Plaintiff’s motion to compel and Defendant’s motion for a protective order. (Dkt. No. 65.) The
19 documents at issue are “annual financial statements, including [Defendant’s] annual reports,
20 profit/loss statements, balance sheets, income statement, statement of cash flow, notes, and
21 letters and other documents from auditors, for each year from 2006 through present,” as well as
22 “documents . . . created or modified since January 1, 2006, summarizing or analyzing operating
23 expenses, revenues, and assets for the site.” (Dkt. No. 46 at 10 n. 6; Dkt. No. 65 at 2.) In its
24 initial responses to these requests in 2013, Defendant responded that “relevant, non-privileged
25 documents will be produced.” (Dkt. No. 47, Ex. A.)
26

1 Defendant does not dispute that at least some of the financial records are relevant.¹
2 Defendant instead argues that the request is overbroad and that there should be limits on how the
3 confidential commercial information is disclosed. (Dkt. No. 65 at 21.) The Court would be
4 receptive to an argument about which particular aspects of Plaintiff's requests are overbroad, but
5 Defendant's description of the request as "wildly excessive" and "burdensome" does not meet its
6 burden of demonstrating that there is some subset of documents that it will be harmed or
7 prejudiced by producing. *See Foltz*, 331 F.3d at 1130 (describing moving party's burden). This is
8 particularly true when Defendant agreed to produce "relevant, non-privileged documents," and
9 yet, nearly a year later, has apparently produced no financial documents.

10 Defendant does make two specific proposals for how the confidential information should
11 be provided. The first proposal is that Defendant simply "provide the bottom line numbers and
12 data from audited financial statements that Shefftz needs to perform his analysis." (Dkt. No. 65
13 at 4.) The Court agrees with Plaintiff that this proposal is unreasonable: Defendant agrees that
14 the documents are relevant but seeks to avoid allowing Plaintiff to see them at all. Alternatively,
15 Defendant proposes that Plaintiff's expert be allowed to review Defendant's financial records at
16 Defendant's offices or another convenient location and take notes about the records without
17 being allowed to copy or keep any of those records. (Dkt. No. 65 at 4.) Plaintiff objects that this
18 second option is "unworkable in a litigation context." (Dkt. No. 65 at 20.) Specifically,
19 Plaintiff's expert suggests that it will be burdensome to arrange travel, that he may not realize
20 what information he needs until after he begins his analysis, and that he will be at a disadvantage
21 to Defendant's expert, who will have unfettered access to the materials, including for trial

22
23 ¹ The Court notes, however, that Plaintiff's heavy reliance on *RE Sources for Sustainable*
24 *Communities v. Pacific Int'l Terminals, Inc.*, No CV11-2076-JCC (W.D. Wash., Jan. 8, 2013) is
25 misplaced. Unlike in that case, Defendant here has stipulated to its ability to pay a penalty (Dkt.
26 No. 35), which undermines the reasoning of the original *RE Sources* order. Neither does
Defendant's reliance on the Court's request for additional briefing from Plaintiff in that case
resolve the issue, particularly given the lack of specificity in Defendant's arguments here
regarding relevance.

1 preparation. (Dkt. No. 66.)

2 The Court disagrees with Defendant that subjecting Defendant's expert to the "same
3 conditions and restrictions" would remove any specter of unfairness. Even if neither expert has
4 hard copies of documents available at a deposition or at trial, Defendant's expert will clearly
5 have easier and more-extensive access to the documents for preparation and review. This
6 discrepancy is not addressed simply by allowing Plaintiff's expert additional visits to the
7 documents, particularly when the expert appears to live in Massachusetts. (Dkt. No. 66.) The
8 Court therefore concludes that neither of Defendant's proposals is reasonable and DENIES the
9 protective order. In light of Defendant's representation in its initial responses that it would
10 produce relevant, non-privileged documents, the Court GRANTS Plaintiff's motion to compel.
11 Defendant is ORDERED to produce documents responsive to Plaintiff's First Set of Requests for
12 Production 25 and 26 within 14 days. (Dkt. No. 43 at 30.)

13 **D. Leave to File Response or Strike**

14 Surreplies are limited strictly to motions to strike. *See* W.D. Wash. Local Civ. R. 7(g)(2).
15 Applying this standard, the Court GRANTS Plaintiff's request to strike Defendant's surreply,
16 which seeks to provide additional argument, and STRIKES the surreply. (Dkt. No. 58.)

17 **E. Award of Fees**

18 Plaintiff seeks fees both for Defendant's behavior as documented in its current motion
19 and for opposing Defendant's protective-order request that this Court denied in June. (Dkt. No.
20 46 at 13.) Having reviewed the record, the Court concludes that no award of fees is appropriate.

21 **F. Continuance**

22 Plaintiff seeks a continuance of four months, and Defendant does not oppose a "modest
23 continuance." (Dkt. No. 51 at 13.) Considering also the needs of this Court's schedule, the Court
24 VACATES the trial currently set for March 31, 2015, and RESETS the trial for 9:30 a.m. on July
25 13, 2015. The pre-trial deadlines are continued accordingly.
26

II. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART Plaintiff's motion (Dkt. No. 46), GRANTS Plaintiff's motion to strike (Dkt. No. 60), and DENIES Defendant's motion for a protective order (Dkt. No. 65).

DATED this 23rd day of September 2014.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE